85-1160

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS ENERGY INVESTMENT CORP. AND ADVANCED TECHNOLOGY, LTD.,
Petitioners,

v.

NIMROD MARKETING (OVERSEAS) LTD. AND TOM ANDERSON-SLIGHT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. QUESTION PRESENTED FOR REVIEW

Whether a defendant, when timely demand for a jury trial has been made and no waiver of that demand has occurred, is entitled to a jury trial under the seventh amendment to the United States Constitution if the plaintiff's theory of recovery is promissory estoppel but the sole remedy sought and awarded is the legal remedy of money damages.

II. LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

Additionally, the following listed persons have an interest in the outcome of this case and are listed in order that the Justices of this Court may evaluate possible disqualification or recusal:

1. Texas Energy Petroleum Corporation
2. James Allison
3. Texas Energy International S.A.
4. Texas Reserve Construction Company

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Petitioners,

v.

NIMROD MARKETING (OVERSEAS) LTD. AND TOM ANDERSON-SLIGHT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners respectfully seek a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit denying petitioners their right to a jury trial under the seventh amendment to the United States Constitution.

V. OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 769 F.2d 1076 (5th Cir. 1985), and a copy is included in the Appendix. Additionally, a copy of the Fifth Circuit's denial of all parties' Petitions for Rehearing is included in the Appendix.

VI. JURISDICTION OF THIS COURT

The opinion of the Fifth Circuit was issued on August 30, 1985. Counsel for both sides subsequently filed timely Petitions for Rehearing, and the appellate court denied these Petitions for Rehearing on October 10, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

VII. CONTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners' right to a jury trial is secured by the seventh amendment to the United States Constitution which states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

Jurisdiction in this Court is based on 28 U.S.C. § 1254 (1) which states:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .

28 U.S.C. § 1254(1).

VIII. STATEMENT OF THE CASE

This case was tried in the United States District Court for the Southern District of Texas. Jurisdiction was based on diversity of citizenship. Respondent Nimrod is a United Kingdom corporation with its principal place of business in London, England.[1] FFCL, Rec. V. p. 1. Respondent Anderson-Slight is an individual who resides in London, England. *Id.* The trial court found that petitioners conduct their principal business in Houston, Texas. *Id.* pp. 1-2. The trial court, sitting in diversity, applied the Texas law of promissory estoppel to the facts of this case. *Id.* pp. 1, 18-21. Central issues in the case including piercing of the several separate and distinct corporate entities which form Texas Energy and whether or not the parties had indeed executed a legally sufficient contract. However, these issues are not presented in this petition, and accordingly, this statement does not discuss them.

Respondents demanded a jury trial in their initial pleading. *Plaintiff's Original Complaint,* Rec. VII. p. 3. Respondents restated their demand for a jury trial in the first amended complaint. *Plaintiffs' First Amended Com-*

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1. Abbreviated references include the following:
   Rec: denotes documents included in the *Record Excerpts,* including pleadings, memoranda and orders of the Trial Court, *Findings of Fact and Conclusions of Law,* and portions of the trial transcript;
   FFCL: denotes the Trial Court's *Findings of Fact and Conclusions of Law;*
   Tr.: denotes page references from the transcript of proceedings;
   LL: denotes precise lines from pages of the transcript of proceedings. Because of the voluminous nature of these records, counsel for petitioners has not asked the Clerk of the Fifth Circuit to certify copies for this Court's use. Counsel for petitioners will, however, arrange for such certification of copies upon request.

plaint, Rec. VI. p. 6. Immediately prior to the trial of this case, on September 8, 1983, Dana G. Kirk, counsel for petitioners, specifically requested a trial by jury. Tr. September 8, 1983, Rec. VIII. pp. 5-7. The district court summarily overruled Mr. Kirk's request on the basis of waiver. *Id.* p. 7. The district court refused to address this issue in *Defendants' Motion for New Trial or Alternatively Motion to Amend Judgment. Memorandum and Order,* Rec. III. p. 1 ("Defendants' first three grounds are meritless"). The case was tried before the district court sitting without a jury.

On appeal to the Fifth Circuit, both parties submitted extensive briefing on the issues of waiver of the seventh amendment right to a jury trial and the issue of whether a constitutionally enforceable right to a jury trial exists if the plaintiffs' theory of recovery is promissory estoppel but they seek and are awarded solely the legal remedy of money damages. The Fifth Circuit held that petitioners had not waived their right to a jury trial, but further held that petitioners were not entitled to a jury trial in a promissory estoppel case anyway. *Nimrod (Overseas) Ltd. v. Texas Energy Investment Corp.,* 769 F.2d at 1079-80. Petitioners prosecute this Petition for Writ of Certiorari on the grounds that a right to a trial by jury did exist and was held to be non-existent by the Fifth Circuit in contravention of the seventh amendment to the United States Constitution. Petitioners ask this Court to allow any briefing or oral arguments it deems necessary on this issue and to ultimately reverse the Fifth Circuit's decision in this regard and order this case to be remanded to the District Court for the Southern District of Texas for a new trial before a duly selected jury.

IX. REASONS FOR GRANTING THE WRIT

A. THE FIFTH CIRCUIT'S OPINION IS INCONSISTENT WITH THE DECISION OF THIS COURT IN *CURTIS V. LOETHER*, 415 U.S. 189 (1974).

This Court unanimously has held that the basic nature of the remedy sought controls a litigant's right to a jury trial. *Curtis v. Loether*, 415 U.S. 189 (1974). In *Curtis*, this Court held that the right to a jury trial was applicable because the damages sought under a Title VIII cause of action were analogous to damages sought in traditional common law tort causes of action. *Id.* at 196. *See Moore's Federal Practice*, § 38.11[6], at 38-86 ("Although an action for rescission and cancellation is equitable, where such an action is brought to cancel an insurance policy because of fraud and the defendant counterclaims for the proceeds for the policy, the basic nature of the issue as thus presented is legal.") In its August 30, 1985, opinion, however, the Fifth Circuit chose to cite the *Curtis* opinion to support its decision to deny petitioners their right to a jury trial.

The seventh amendment to the Constitution unequivocally states that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII. Under the Federal Rules of Civil Procedure "[t]he right of trial by jury as declared

by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." Fed. R. Civ. P. 38(a).

The Fifth Circuit's reliance on *Curtis v. Loether,* therefore, was incorrect because that opinion supports the constitutional principle allowing jury trials. Even the language from the *Curtis* opinion that the Fifth Circuit chose to quote states that a right to a jury trial exists in "suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, *and equitable remedies were administered. . . .*" *Nimrod Marketing v. Texas Energy,* 769 F.2d at 1079, quoting *Curtis v. Loether,* 415 U.S. at 193.

Petitioners draw the Court's attention to the emphasized language—"and equitable remedies were administered." This Court used the inclusive conjunction "and" in its *Curtis* opinion for a reason. It intended that a jury trial would be allowed unless both of two factors existed: first, that only equitable rights were being recognized; and second, that only equitable remedies were being administered. Petitioners contend that respondents have from the inception of this lawsuit sought the *legal* remedy of monetary damages.

One commentator has set forth the rule governing the situation before this Court today as follows:

> In general, there is no right to a trial by jury of claims that historically were "equitable," such as actions for injunction, specific performance, and the like. There is a right to trial by jury in actions that historically would have been considered "legal," of which actions for money damages for tort or breach

> of contract are the most familiar examples. If new causes of action are created unknown at common law, the courts must look to the nearest historical analogy to decide whether there is a right to a jury.

Wright, *Federal Courts* 450-51 (3d ed. 1979).

1. An Historical Analysis Supports Petitioners' Position

The first factor that this Court should analyze to determine the right to a jury trial in this case is the historical perspective or custom regarding the nature of the remedy that respondents sought. *Ross v. Bernhard*, 396 U.S. 531, 538 (1970); *Mintzer v. Arthur L. Wright & Co.*, 263 F.2d 823 (3rd Cir. 1959). Neither general historical jurisprudence nor the Fifth Circuit's own authority in its opinion support the position which that court has adopted.

The law is well settled that actions recognized at common law should be tried to a jury if a timely demand for a jury is made. *Moore's Federal Practice*, at 38-78. The nature of the *remedy* that respondents sought, as is clear from their amended complaint and the agreed pretrial order, was money damages. Even though the *theory* advanced by respondents was promissory estoppel, therefore, they sought and received a traditional common law remedy.

In addition to the nature of the remedy that the respondents sought, which classifies this cause of action as one that is subject to the right to a jury trial, an historical perspective reveals common law causes of action that are very analogous to the present one. Two such common law causes of action are trespass on the case, which embraces suits for fraud and deceit, and special assumpsit,

a common law cause of action to recover damages on a simple contract. *Moore's Federal Practice,* at 38-78 to 38-80. The analogy of the present case to an action to recover damages on a simple contract is clear. For a clear understanding of the analogy to fraud and deceit, however, it is necessary to compare the elements of the common law action and the elements of a promissory estoppel cause of action.

The elements of the common law cause of action for fraud are material false representation, knowledge on the part of the defendant of falsity, intent that the plaintiff act upon the false representation, justifiable reliance on the part of the plaintiff, and injury to the plaintiff. *Levine v. Loma Corp.,* 661 S.W.2d 779, 783 (Tex. Civ. App.—Ft. Worth 1983, no writ); W. Prosser, *Law of Torts* 728 (5th ed. 1984). The Texas Supreme Court has defined the action in promissory estoppel very similarly. In *A. R. Clark Investment Co. v. Green,* 375 S.W. 2d 425 (Tex. 1964), the Texas Supreme Court stated that "the party claiming the estoppel must show that a false representation or concealment of material facts exist. Furthermore, the party to whom such false representation was made must have relied on or acted on it to his prejudice." *Id.* at 435. The only real difference between these two causes of action is the degree of intent on the part of the defendant. Estoppel may, at least in theory, require less of an element of intent on the defendant's part. In reality, however, these causes of action are almost identical, and the nature of each of them requires findings of fact that fall within the ambit of a jury's realm of expertise, not purely legal determinations by the court.

One commentator has described the historical difference between law and equity as follows: "The jurisdictional

line that divided Westminster Hall was drawn largely, if not exclusively, in terms of the remedy sought." Wright, *Federal Courts* at 451. The remedy that the respondents sought was money damages, clearly a legal remedy. Respondents' cause of action was extremely analogous to the common law cause of action for fraud or deceit and the common law cause of action for special assumpsit, and the right to a jury trial therefore should be based upon the fact that jury trials traditionally have been allowed in both of these common law causes of action.

In addition, the decisions cited by the Fifth Circuit to support its position to deny petitioners their right to a jury trial are all distinguishable from this case. First, *Earlie v. Jacobs,* 745 F.2d 342 (5th Cir. 1984), involved a claim for *injunctive relief* for reinstatement and back pay, and appended illusory claims for actual and punitive damages. The Fifth Circuit based its decision in *Earlie* on the fact that injunctive relief seeking court-ordered reinstatement into a job is equitable in nature. The remedy of injunctive relief clearly is equitable, yet it also clearly is different from respondent's claim for money damages in this lawsuit.

Second, *Cooley v. Strickland Transportation Co.,* 459 F.2d 779 (5th Cir. 1972), dealt with the issue of whether the seventh amendment guarantees the right to a jury composed of twelve, as opposed to six, jurors. The Fifth Circuit's holding in that case was "that the twelve-member panel is not a necessary requirement of 'the right of trial by jury' in civil cases." *Id.* at 780. The legal issue analyzed and the holding rendered, therefore, do not in any way support the contention that petitioners were not entitled to a jury trial in this case. To the contrary, as far as *Cooley* is analogous to this case, it supports petitioners'

position. *Cooley* involved a suit for money damages for wrongful death and a jury was allowed. The only issue was how large the jury would be. Likewise, respondents have sought money damages and a jury trial should have been allowed.

Last, in *Gefen v. United States,* 400 F.2d 476 (5th Cir. 1968), the Fifth Circuit dealt with the foreclosure of federal tax liens. The Fifth Circuit quoted from Judge Friendly's opinion in *Damsky v. Zavatt,* 289 F.2d 46 (2d Cir. 1961), in which Judge Friendly stated the following:

> Foreclosure of the mortgagor's equity of redemption was an established head of equity jurisdiction well before 1791, How v. Vigures, 1 Rep. Ch. 32, 21 E.R. 499 (1623); Emanuel College v. Evans, 1 Rep. Ch. 18, 21 E.R. 494 (1625); and this necessarily embraced the determination of the amount and validity of the mortgage debt. 1 Glenn, Mortgages (1943), 399-400. The more modern method of foreclosure through decree of sale, provided for United States tax liens by I.R.C. § 7043, is sufficiently akin to the historic equity practice to preclude successful contention for a right to jury trial with respect to the ascertainment of the amount of tax lien as against taxpayer's property and enforcement of the lien by sale.

Id. at 53, quoted favorably in *Gefen v. United States,* 400 F.2d at 478. Respondents' claim for money damages, to the contrary, is not "an established head of equity jurisdiction." Rather, respondents' claim for money damages on a theory of promissory estoppel is analogous to the common law legal causes of action for trespass on the case and special assumpsit.

2. Respondents Sought the Legal Remedy of Money Damages

The second factor that this Court should consider is the nature of the remedy sought by respondents. The nature of the *remedy* that respondents sought, as is clear from their amended complaint and the agreed pre-trial order, was money damages. The record is replete with evidence that the true nature of respondents' cause of action does not at all seek traditional equitable remedies, but sounds loudly and unequivocably as an action for money damages. For example, the respondents in the instant case sought two million dollars in damages in the trial court. *Plaintiffs' First Amended Complaint,* Rec. VI. p. 6. In the pre-trial order, submitted jointly by the parties, the respondents claimed a cause of action based upon the *theory* of promissory estoppel, claiming *damages* for restocking charges, cancellation of transportation arrangements, subsistence, out-of-pocket expenses, travel expenses and, additionally, lost profits and commissions. *Joint Pre-Trial Order,* Rec. XI, p. 3. Also, the agreed contested issues of fact included *damages* suffered by respondents as a result of lost profits and commissions. *Id.* at p. 10. Additionally, respondents stated in their prayer for relief that "Plaintiffs pray that the liability of the Defendants be established and that Plaintiffs be awarded just and reasonable damages and for general relief." *Plaintiffs' First Amended Complaint,* Rec. VI. p. 6 (emphasis added). Based upon this record, this Court's decision in *Curtis v. Loether,* and the Third Circuit's conclusion that "[g]enerally it is the form of relief prayed which determines whether a claim sounds at law or in equity," *Mintzer v. Arthur L. Wright & Co.,* 263 F.2d 823 (3rd Cir. 1959), the Fifth Circuit should have recognized that petitioners had a right to jury trial

in this lawsuit. Even the Fifth Circuit's own discussion of recoverable damages in this case blended any seeming distinction between equity and law and referred to "losses resulting from collateral *contracts*" that "are recoverable in *an action for breach of contract.*" *Nimrod Marketing (Overseas) Ltd. v. Texas Energy Investment Corp.*, 769 F.2d 1080. (emphasis added).

Even though the *theory* advanced by respondents was promissory estoppel, therefore, they sought and received a traditional common law remedy. One commentator has discussed this distinction between seeking the remedy of damages and advancing an equitable claim. The commentator stated the following:

> [A] claim for damages for breach of contract is legal and a claim against the debtor's transferree to set aside the transfer as fraudulent is usually equitable; a claim to enjoin violation of the anti-trust acts is equitable and a claim for damages under the acts is legal; a claim to enjoin repeated trespasses is equitable and a claim for a statutory penalty for the trespass is legal; a claim for damages for negligent injury to property is legal and a claim to enjoin future injury is equitable.
>
> At times a plaintiff (or other claimant) may have a choice of remedies. Some contracts, for example, are of such a nature that specific performance will be compelled, so the injured party may frame his complaint for specific performance and the issues are equitable. On the other hand, if he frames his complaint to recover damages, the issues are legal. The holder of a patent, copyright or a trademark may seek only the equitable remedies of an injunction and an equitable accounting; or he may seek only legal relief, damages; or he may seek both the equitable *and* legal remedies.

Moore's Federal Practice, at 38-85 to 38-86.

Respondents did not seek to set aside a transfer. Respondents did not seek an injunction. Respondents did not seek specific performance. Respondents did not seek an equitable accounting. At all times, respondents sought money damages. Additionally, the trial court awarded respondents money damages. The remedy sought by respondents, therefore, undeniably was money damages and was, therefore, legal in nature at common law; and in modern jurisprudence, such a cause of action requires findings of fact that should be determined by a jury. This Court has zealously guarded the right to a jury trial under the seventh amendment, Wright, *Federal Courts* at 448, and the Fifth Circuit should not allow that right to be infringed upon simply because the respondents worded their complaint under the guise of promissory estoppel. As this Court has stated, "The Constitutional right of trial by jury cannot be made to depend upon the choice of words used in the pleadings." *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 477-78 (1962). Equitable relief is allowed only where the remedy at law is inadequate. *Id.; Beacon Theaters, Inc. v. Westover,* 359 U.S. 500 (1959); Wright, *Federal Courts* at 453. Respondents obviously did not feel that their remedy at law was inadequate. The only remedy for which they asked was the legal remedy of money damages. This Court, therefore, should not allow inapplicable equitable principles to be applied by the Fifth Circuit, and petitioners' right to a jury trial under the seventh amendment should not be infringed.

3. Necessary Findings of Fact Were Within the Province of a Jury's Abilities

In addition to the historical perspective and the nature of the remedy sought, this Court has indicated that the practical abilities and limitations of a jury should have

been considered to decide the right of petitioners to a jury trial. *Ross v. Bernhard,* 396 U.S. at 736; *Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962) (an equitable accounting is available only when the legal remedy is inadequate because the accounts are so complicated that the court alone can satisfactorily unravel them).

The facts in the instant case were not so complicated that a jury could not easily deal with them and reach a just conclusion as to the fact issues presented. A jury could have, and should have, been allowed to determine the simple issue of which party was telling the truth about certain disputed facts. Such determinations have for years fallen within the well recognized and well-respected province of the jury. As one commentator has stated, "[M]aintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to jury trial should be scrutinized with the utmost care." Wright, *Federal Courts* at 448.

B. FEDERAL CIRCUIT COURTS OF APPEALS CONFLICT ON THE ISSUE OF WHETHER JURY TRIALS ARE REQUIRED WHEN EQUITABLE THEORIES OF RECOVERY ARE ESPOUSED.

In its opinion in this case, the Fifth Circuit cited *Earlie v. Jacobs,* 745 F.2d 342 (5th Cir. 1984), to support its conclusion. In the *Earlie* decision, however, the Fifth Circuit specifically recognized that all of the federal circuit courts of appeal do not agree with the approach to jury trials espoused in that decision. *Id.* at 344, citing *Novack Investment Co. v. Setser,* 657 F.2d 962 (8th Cir.), *cert. denied,* 454 U.S. 1064, 102 S. Ct. 615, 70 L.Ed.2d 601 (1981).

Justices White, Brennan, and Marshall of this Honorable Court filed a strong dissent to the denial of the petition for writ of certiorari in *Novack Investment Co. v. Setser,* 102 S. Ct. at 615-617, because of this conflict between the circuit courts on the issue of right to a jury trial in equitable situations. *See id.,* citing *Setser v. Novack Investment Co.,* 638 F.2d 1137 (8th Cir. 1981) and *Moore v. Sun Oil Co. of Pennsylvania,* 636 F.2d 154 (6th Cir. 1980). While these cases are factually distinguishable, the theory as it relates to jury trials is the same, and the petitioners urge this Court, therefore, to grant this Petition for Writ of Certiorari in the instant case so that this conflict among the Fifth, Sixth, and Eighth Circuits can once and for all be laid to rest.

C. THIS COURT HAS NOT, BUT SHOULD, DECIDE THIS IMPORTANT AND FUNDAMENTAL QUESTION OF CONSTITUTIONAL PROTECTION.

This Court should apply the long established principles of right to jury trials to the issue of promissory estoppel presented to the Court for decision in this case. The Court can use this case to establish the broad precedent that when a legal remedy is sought the seventh amendment right to a jury trial should be held inviolate.

The right to a jury trial is a zealously protected right in American jurisprudence. In the instant case, this fundamental right was denied by the trial court on the theory of waiver. The Fifth Circuit specifically found that no waiver had in any manner occurred. Based on these facts, this Supreme Court and no other should decide if the right to a jury trial did indeed exist.

This matter is of substantial importance in our judicial system, which traditionally has lauded itself because of

the inimitable and irreplaceable right it provides to trial by a jury of one's peers. Such an infringment of this right as exists in this case merits the granting of this Petition for Writ of Certiorari.

X. CONCLUSION

Petitioners respectfully submit that the Fifth Circuit's opinion of August 30, 1985, wrongfully denied petitioners' right to a jury trial under the seventh amendment to the Constitution. The Fifth Circuit's opinion conflicts with the principles of this Court's decision in *Curtis v. Loether*, and further provides this Court with the opportunity to not only resolve a conflict among the circuits but also to establish unequivocally that when legal remedies are sought the litigants are constitutionally entitled to a jury trial on all factual issues presented by the case. Petitioners, therefore, pray that this Court grant their Petition for Writ of Certiorari, allow any briefing or oral arguments thereon it deems necessary, and ultimately reverse the appellate court's decision and remand this case for a trial of all factual issues before a duly impaneled jury.

Respectfully submitted,

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APPENDIX A

NIMROD MARKETING (OVERSEAS) LTD.
and T. Anderson-Slight,
Plaintiffs-Appellees,

v.

TEXAS ENERGY INVESTMENT CORP., et al.,
Defendants-Appellants.

No. 84-2247.

United States Court of Appeals,
Fifth Circuit.

Aug. 30, 1985.

Purchasing agent brought action against participants in joint venture formed to build low-cost housing for Russian steelworkers in Nigeria seeking cancellation charges and expenses resulting from breach of purchasing agent agreement. After bench trial, the United States District Court for the Southern District of Texas, Ross N. Sterling, J., entered judgment in favor of purchasing agent on doctrine of promissory estoppel and awarded damages, and participants in joint venture appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) participants in joint venture did not waive jury trial; (2) participants in joint venture had no right to trial by jury; (3) purchasing agent was entitled to recover cancellation charges; and (4) proper rate of exchange between British pound sterling and dollars was date as of judgment, not date as of breach.

Affirmed in part, vacated and remanded in part.

Fulbright & Jaworski, Dana G. Kirk, John B. Beckworth, Houston, Tex., for defendants-appellants.

Talbert, Giessel & Stone, Steven P. Mock, Alice M. Giessel, Houston, Tex., for plaintiffs-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before GARZA, POLITZ and DAVIS, Circuit Judges.

POLITZ, Circuit Judge:

Nimrod Marketing (Overseas) Ltd. and its president, Tom Anderson-Slight, invoked diversity jurisdiction and sued Texas Energy Investment Corp. and Advanced Technology, Ltd. (ATL) for cancellation charges and expenses resulting from a breach of a purchasing agent agreement. After a bench trial, the district court found liability based on the doctrine of promissory estoppel and awarded damages. Texas Energy and ATL appeal contending that the court erred (1) in denying their request for a jury trial, (2) in allowing recovery for cancellation charges, and (3) in calculating the dollar damages. We find no error in the jury trial and recovery allowance issues but find error in the damage calculation. Accordingly we affirm in part, reverse in part and remand for entry of an appropriate judgment.

Facts

Texas Energy,[1] a Texas-based oil trading company under contract with the Nigerian government, formed a joint venture with Nigerian investors to build low-cost

1. Texas Energy refers to a group of companies, Texas Energy Investment Corporation, Texas Energy Petroleum Corporation, Texas Energy International, S.A., and Texas Reserve Construction Company, which the trial court found operated as a single entity.

housing for Russian steelworkers in Ajaokuta, Nigeria. In furthering the venture, Texas Energy and the Nigerians formed a partnership cognomened Advanced Technology Ltd.

The partners were immediately confronted with the complex task of getting building materials, equipment, and supplies into Nigeria and arranging for payment with Nigerian funds. In May of 1981, while returning to London from a trip to Lagos, made to conclude the contract with the Nigerian government, William A. Houston, construction superintendent for Texas Energy, found himself serendipitously seated next to Tom Anderson-Slight, president of Nimrod. Nimrod, an international trading company with extensive experience in international trading, had had numerous dealings in West Africa in the prior decade. Upon learning of Texas Energy's need for help in the purchasing and shipping of goods to Nigeria, Anderson-Slight told Houston of his company's expertise and expressed an interest in acting as Texas Energy's purchasing agent for the Nigerian project. During the week that followed, Houston, Anderson-Slight, and Homi Toni Boga, Nimrod's Executive and Technical Director responsible for preparation of schedules, estimates, material selection and purchases, met in London to discuss the project in depth. At that time Anderson-Slight and Boga examined in detail a list supplied by Texas Energy of items needed for the project including equipment, construction material, food and living quarters. Following those meetings, Nimrod provided price quotes for items on the list and, subsequently, for items on an updated list.

In late August, Anderson-Slight met in Houston with senior officials of Texas Energy to explain the documenta-

tion necessary for shipments to Nigeria. During Anderson-Slight's four-day stay in Houston, purchase orders were issued by ATL. Items were color-coded to reflect priority in shipment. The initial purchase orders covered items color-coded green, indicating those items to be shipped immediately. Verbal purchase orders were also issued at that time.

During this August 1981 visit to Houston, Anderson-Slight was given two "comfort" letters dated September 1, 1981 and September 2, 1981, appointing Nimrod as purchasing agent for the Nigerian project. The first letter authorized Nimrod to purchase upon order of ATL. The second letter authorized Nimrod to act upon orders of Texas Energy.

Acting pursuant to the comfort letters, purchase orders, and verbal authorizations of ATL employees, Anderson-Slight began acquiring equipment and materials from Nimrod suppliers. In addition, Nimrod incurred expenses for several trips to Nigeria between June and October of 1981.

Several weeks later the matter ground to a halt. At a meeting in Houston sometime between October 31, 1981 and November 4, 1981, Texas Energy representatives informed Anderson-Slight that because of a disagreement over financing with their Nigerian partners they were withdrawing from the project. Unable to resolve their differences, Nimrod and Anderson-Slight filed suit seeking damages for expenses and charges incurred in cancelling the contracts with its suppliers. They grounded their claims on promissory estoppel. At the time of trial, despite receipt of demand letters and threats of litigation, no supplier had filed suit against Nimrod, opting instead

to forego legal action until the conclusion of the instant suit.

Nimrod originally requested a jury trial but withdrew that request at a pretrial conference. Texas Energy and ATL promptly asked for a trial by jury, a request reflected in the pretrial order and repeated at the outset of the trial. The district court denied the request on a finding that Texas Energy and ATL had waived their demand for trial by jury.

After a bench trial, judgment was rendered in favor of Nimrod and Anderson-Slight on a finding that they had relied on the "comfort letter" of September 1, 1981 to their detriment. Damages for cancellation charges and out-of-pocket expenses incurred after receipt of that letter were awarded. In computing the cancellation charges the trial court applied the monetary exchange rate for British pounds sterling into United States dollars applicable on the date of the breach of the agreement. The exchange rate at that time was $1.90/1 pound sterling. The exchange rate on the date of final judgment, January 26, 1984, was $1.4045/1 pound sterling. The rate as of this writing is near $1.30/1 pound sterling. The rate has obviously varied markedly in the time period involved.

Analysis

A. Jury Trial.

[1] Texas Energy and ATL insist that they did not waive jury trial and maintain that the trial court erred in denying their request. We are persuaded that the trial court erred in concluding that Texas Energy and ATL waived a jury trial. They were entitled to rely on Nimrod's demand for jury and it was not necessary that they assert

that demand until Nimrod withdrew its request. *Pinemont Bank v. Belk*, 722 F.2d 232 (5th Cir. 1984); *Southland Reship, Inc. v. Flegel*, 534 F.2d 639 (5th Cir. 1976). Their request was timely.

The Federal Rules of Civil Procedure provide the mechanism for waiver of a requested jury trial. Rule 39(a) provides in pertinent part:

> The trial of all issues so demanded shall be by jury unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. . . .

Texas Energy and ATL entered no written or oral stipulation consenting to trial by the court. To the contrary, the pretrial order shows that they demanded trial by jury immediately after Nimrod expressed a willingness to waive its demand. That request was repeated at the beginning of the trial and consistently maintained to and through the appeal.

[2-4] Although the trial court inadvertently erred in finding waiver, it did not err in declining Texas Energy and ATL's request for a jury trial. Plaintiffs' complaint was not triable by jury. The seventh amendment is not absolute; it does not assure a trial by jury of all justiciable disputes. As the Supreme Court observed in *Curtis v. Loether*, 415 U.S. 189, 193, 94 S. Ct. 1005, 1007, 39 L.Ed.2d 260 (1974) (*quoting in part Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-47, 7 L.Ed. 732 (1830)):

> [I]t has long been settled that the right extends beyond the common-law forms of action recognized [in 1791]. . . . "The phrase 'common law,' found in

> this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence . . . not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . ."

See also Earlie v. Jacobs, 745 F.2d 342 (5th Cir. 1984); *Cooley v. Strickland Transp. Co.,* 459 F.2d 779 (5th Cir. 1972); *Gefen v. United States,* 400 F.2d 476 (5th Cir. 1968). Promissory estoppel is an equitable form of action in which equitable rights alone are recognized. *Wheeler v. White,* 398 S.W.2d 93 (Tex. 1965); *Richey v. Miller,* 142 Tex. 274, 177 S.W.2d 255 (1944); *Keene v. Gold,* 27 S.W.2d 631 (Tex. Civ. App. 1930). Defendants had no right to trial by jury; there was nothing to waive.

B. Recovery of Cancellation Charges

Texas Energy and ATL argue that the court erred in allowing recovery for cancellation charges because those charges had not been paid to Nimrod's suppliers as of the date of trial. The suppliers had apparently agreed to defer their claims pending the outcome of the instant litigation. Appellants maintain that the damages awarded for the cancellation charges were speculative and contingent. We find this argument without merit.

[5] Under well-settled Texas law, losses resulting from collateral contracts are recoverable in an action for breach of contract if the breaching party "had knowledge of the special circumstances producing such damages." *Longview Const. & Dev., Inc. v. Loggins Const. Co.,*

523 S.W.2d 771, 777 (Tex. Civ. App.—Tyler 1975); *Texas Power & Light Co. v. Barnhill,* 639 S.W.2d 331 (Tex. App.—Texarkana 1982), *writ ref'd n.r.e.*

[6] It is beyond peradventure that Texas Energy and ATL were aware that Nimrod and Anderson-Slight promptly began placing orders for supplies, equipment, and material pursuant to the September 1, 1981 comfort letter and the written and oral purchase orders for such goods. They clearly had knowledge of the special circumstances producing damages upon their breach of the purchasing agent agreement. The trial court did not err in finding them liable for these damages.

[7] Texas Energy and ATL would find shelter in the apparent willingness of Nimrod's creditors to forebear their right to exact payment from Nimrod pending the outcome of this suit. They misperceive the prevailing rule. This action by Nimrod's creditors does not constitute a release of a legal obligation inuring to defendants' benefit. *Aubrey v. Workman,* 384 S.W.2d 389 (Tex. Civ. App.—Fort Worth 1964). *See Kennard v. McCray,* 648 S.W.2d 743 (Tex. App.—Tyler 1983). Nor were the charges contingent and speculative. They were specific and certain. The trial court found the incurred charges to be: Consortex, S.A., 116,250 U.S. dollars; A. G. Knight, 81,666 British pounds sterling; Inder., 66,710 British pounds sterling; and Map Speed Freight, 37,912 British pounds sterling.

C. Rate of Exchange.

Texas Energy and ATL contend that the district court erred in its calculation of damages in dollars. They maintain that the court should have converted the amounts

due the three suppliers in British pounds sterling into dollars as of the date of judgment, not the date of the breach. We agree that the trial judge erred in this respect.

[8-10] Recovery under the theory of promissory estoppel is limited to "the amount necessary to compensate that party for a loss already suffered." *Sun Oil Co. (Delaware) v. Madeley,* 626 S.W.2d 726, 734 (Tex. 1981); *Wheeler v. White,* 398 S.W.2d 93 (Tex. 1965). One recovering under promissory estoppel should not be penalized, nor should one experience a windfall. The contracts call for Nimrod to pay most of the cancellation damages in British pounds sterling. Nimrod has not yet paid those debts and to be made whole should receive the amount in dollars that will purchase the precise number of pounds required for those payments. To avoid both penalty and windfall the court should direct payment in dollars convertible from British pounds sterling based on the exchange rate on the date the corrected judgment is enterred.

The judgment of the district court is AFFIRMED except as to the calculation of damages. That part of the judgment is VACATED and the matter is REMANDED for entry of a judgment consistent herewith.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2247

NIMROD MARKETING (OVERSEAS) LTD. and
T. ANDERSON-SLIGHT,
Plaintiffs-Appellees,

v.

TEXAS ENERGY INVESTMENT CORP., ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

ON PETITIONS FOR REHEARIN

(October 10, 1985)

Before, GARZA, POLITZ and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED. The mandate should reflect the assessment of interest from date of entry of corrected judgment.

ENTERED FOR THE COURT:

By: /s/ HENRY A. POLITZ
United States Circuit Judge